UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 581

Case No. 618: NARULA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Arnold Kean; Mr. Hubert Thierry;

Whereas at the request of Ashwani Kumar Narula, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 September 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 10 September 1991, the Applicant filed an application containing pleas which read, in part, as follows:

"I. PLEAS

...

11. With regard to additional evidence, the Applicant respectfully requests the Tribunal to call for evidence and for cross-examination:

(a) ..., Chairman Staff Council, United Nations Economic & Social Commission for Western Asia [ESCWA], Baghdad, Iraq (Now functioning temporarily at Amman, Jordan),

(b) The documentation on and the tape recordings of the statements made by the Assistant Secretary-General, OHRM [Office of Human Resources Management], during his meeting

with the staff of the United Nations Economic and Social Commission Western Asia Baghdad Iraq (...),

(c) Appointment and Promotion Board records concerning the selection for the post of Chief, Joint UNIDO/ESCWA Industry Division.

12. On the merits of the case the Applicant requests the honourable Tribunal:

(a) To find...

(iii) That the Applicant had full expectancy of continuation of service with the United Nations as past extensions of his contract had been merely a routine matter;

(iv) That the decision by the Executive Secretary, UNESCWA, on non-extension of the Applicant's contract was arbitrary, was devoid of valid reasons, was grossly discriminatory ... was incorrect and was malafide;

(v) That the said decision was not based on the stated reason of the changing requirements of the UNESCWA region but was due to extraneous reasons and personal interests of Mr. Abdel Jaber, Executive Secretary, ESCWA, and that it was grossly discriminatory;

...

(b) To order the Respondent...

(i) To rescind his decision on non-extension of Applicant's employment contracts;

(ii) To reinstate the Applicant at level L6/DI as Regional Adviser UNESCWA or to offer the Applicant an equivalent post as permanent staff;

(iii) To pay to the Applicant full salary, allowances, benefits, Pension Fund contribution, perquisites and other entitlements for the period between 31 December 1989 and the date the Applicant rejoins the United Nations as per (ii) above;

(iv) to pay compensation equivalent to one year salary for causing injury to the life of the Applicant and that of his family;

(v) To locate official status file of the Applicant."

Whereas the Respondent filed his answer on 15 April 1992;

Whereas the Applicant filed written observations on 24 May 1992;

Whereas, on 21 October 1992, the Applicant submitted an additional statement;

Whereas, on 30 October 1992, the Tribunal put a question to the Respondent and on 12 and 18 November 1992, he provided an answer thereto;

Whereas, on 17 November 1992, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 21 January 1979, on a two month fixed-term appointment as a Senior Economic Affairs Officer at the P-5, step I level at the Joint ESCWA/UNIDO Industry Division. He served in that capacity on a succession of fixed-term appointments until 30 September 1979. On 1 October 1979, he received a one year project personnel appointment at the L-5, step I level, as a Regional Adviser. He then served on a series of fixed-term project personnel appointments of varying duration until 31 December 1989, when he was separated from service at the L-5, step X level.

According to information from the Chief of its Division of Administration Services, ESCWA evaluates the services of Regional Advisers annually to determine whether appointments should be extended or not. The main criteria in the evaluation "apart from performance" is the "extent to which ESCWA member countries had requested services of a particular Regional Adviser". In November 1989, a Committee chaired by the Executive Secretary, met to review the services of the Regional Advisers and approved one-year extensions of appointments for nine Advisers, a six-month extension for another Adviser and the non-renewal of the appointments of the Applicant and of an Iraqi national who had reached the mandatory age of separation from

service. The Chief, Division of Administration Services, stated that only two requests had been made for the Applicant's services for the previous two years, both from Oman, in 1988 and 1989.

The Applicant asserts that on 27 November 1989, "an hour before [he] was to leave for the airport to board the plane for Muscat" to conduct a training workshop, he received a memorandum dated 23 November 1989, from the Executive Secretary, in which he advised the Applicant that:

> "In light of a thorough assessment of the priority needs of the ESCWA Member States and the available resources to meet these needs, I regret to inform you that it has been decided to limit your appointment up to the expiration of your present contract at the end of December 1989."

On 20 December 1989, the Applicant requested the Secretary-General to review the administrative decision not to extend his appointment beyond 31 December 1989. In a further letter dated 26 December 1989, the Applicant stated that the reason for the non-extension of his appointment by the Executive Secretary and for "the haste" with which his post had been vacated, was "to create a place for a country compatriot of the Executive Secretary who has been given a short-term contract as 'Officer-in-Charge, Industry Division' and who is also an external candidate for the post of Chief, Industry Division."

On 29 March 1990, the Director, Staff Administration and Training Division, Office of Human Resources Management, informed the Applicant that the decision not to extend his appointment would be maintained.

On 21 March 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 26 March 1991. Its conclusions and recommendations read as follows:

> "Conclusions and recommendations
>
> 50. The Panel did not find that the appellant had sustained the burden of proof for his allegations that the decision not to renew his fixed-term appointment was improperly motivated.
>
> 51. The Panel found that, at the time of the decision not to renew his appointment, the appellant had, if not a legal expectancy of continued employment, then at least a reasonable expectation of renewal of his fixed-term appointment for one

year or of an earnest search by the Respondent for equivalent alternative employment. The Panel further found that such a search had not been made.

52. The Panel recommends that the appellant be paid compensation equal to six months net base salary at the rate in effect at the time of his separation from the service.

53. The Panel recommends that the appellant not be required to make any refund on account of any advance or advances received by him against education grant for 1989-1990 and that any refund he may have made on that account be restituted to him.

54. The Panel found the appeal not receivable as far as it concerned the failure to promote the appellant or to revise his salary."

On 12 April 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed him that:

"The Secretary-General has re-examined your case in the light of the Board's report. He has decided to maintain the contested decision and to accept, in view of the particular circumstances of your case, the Board's unanimous recommendation that you be paid compensation in an amount equivalent to six months' net base salary at the rate in effect at the time of your separation from service.

The Board has also unanimously recommended that you not be required to make any refund on account of any advance or advances received by you against the education grant for 1989-1990 and that any refund you may have made on that account be restituted to you. Taking into account in this regard the following facts and considerations:

(a) that you did not raise in your appeal the question of payment of the education grant;

(b) that an education grant advance of US$6,250 was given to you in July 1989 for the school year in question and was deducted in its totality from your final payments;

(c) that there is no record in the finance files of ESCWA presently available of settlement of an education grant claim for any part of the school year 1989/90;

(d) that under the staff rules you would have no entitlement to the education grant in respect of the second half of the school year 1989/90, which followed your separation from service, the Secretary-General has decided not to accept the Board's second recommendation as it relates to the second half of the school year 1989/90. With regard to the first half of the school year 1989/90, if a timely claim accompanied by written evidence of the child's attendance, education costs and amounts paid by you was submitted, the appropriate amount should be restituted to you if this has not been done."

On 10 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy of continued employment with the Organization.

2. The decision not to extend the Applicant's appointment was grossly discriminatory and was designed to accommodate a personal friend and compatriot of the Executive Secretary.

3. The Applicant was the only non-Arab among the 12 Regional Advisers and the only one whose contract was not extended.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of continued employment upon the expiration of his fixed-term appointment. The Applicant was granted every reasonable consideration for a further appointment.

2. The decision not to renew the Applicant's appointment was not motivated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 27 October to 19 November 1992, now pronounces the following judgement:

I. The Tribunal has before it sufficient evidence to decide this case without an oral hearing.

II. The Respondent has accepted the unanimous finding of the Joint Appeals Board (JAB) that the Applicant had a reasonable expectancy of further employment after the expiration of his current one-year fixed-term contract, and that he should be paid six months net base salary, as compensation for the failure to employ him for a further year or search for suitable employment for him. Accordingly, the question whether the Applicant had an expectancy of further employment does not arise for decision by the Tribunal.

III. The JAB also recommended that the Applicant should not be required to refund any part of the advance received by him in respect of an education grant for 1989-90 and that any such refund he may have made be restituted to him. The Respondent did not accept this recommendation but agreed to the restitution to the Applicant of the education grant in respect of the first half of that school year, on production of the required evidence. In view of the reasons advanced by the Respondent, the Tribunal concurs in this decision.

IV. The Applicant alleges that the Executive Secretary's decision not to extend or renew his contract of employment was prejudiced and discriminatory. It was, he contends, nepotism motivated by a desire to find a place for a compatriot of the Executive Secretary, by professional jealousy and also by a desire to eliminate from the cadre of Regional Advisers, the only one who was not an Arab.

V. According to the jurisprudence of the Tribunal, the burden of proving prejudice or discrimination rests on the party asserting it. (Cf. Judgement No. 93, Cooperman). The Applicant has not, in the opinion of the Tribunal, discharged this burden in respect of the allegations of nepotism and professional jealousy.

VI. So far as concerns the alleged prejudice of the Executive Secretary against non-Arabs, he is alleged to have said openly that ESCWA is a regional Arab organization in which non-Arabs have no place. The Respondent has not denied this allegation. Furthermore, the Applicant was the only non-Arab among the cadre of 12 Regional Advisers and the only Regional Adviser whose contract was not renewed, apart from one Iraqi who was approaching the age of retirement.

The Executive Secretary's decision not to renew the Applicant's contract, therefore, had the effect of eliminating the only non-Arab from the cadre.

VII. The Tribunal has considered the Respondent's argument that the Applicant's contract was not renewed because of a reduced demand for his services. His expertise lay in engineering, production and maintenance, according to the Respondent, whereas the demand was for assistance in trade and marketing. In consequence, there were only two requests for his services during the previous year, both of them from the Sultanate of Oman. However, the Applicant contends, in support of his allegation of prejudice against non-Arabs, that an Arab colleague with a similar professional background had his contract renewed, having received requests for his services from six Arab States. Although the Tribunal cannot substitute its judgement for that of the Administration as to the need for the employment of particular experts in particular fields, conduct which may be relevant to claims of prejudice may be considered by the Tribunal.

VIII. Concerning the allegation of prejudice by the Executive Secretary against non-Arabs, the Tribunal asked Counsel for the Respondent to provide information as to the Executive Secretary's previous pattern of conduct in appointing Regional Advisers. The information supplied shows that, during Mr. Abdel-Jaber's tenure as Executive Secretary of ESCWA, that is to say from April 1990 to November 1992 inclusive, a period during which the Applicant had made known his interest in a further appointment as Regional Adviser, as well as in a permanent position, six Regional Advisers were appointed, five of Jordanian nationality and one of Iraqi nationality. No non-Arabs were appointed. Under the circumstances of this case, the Tribunal finds that the Applicant has made a prima facie case that his being a non-Arab influenced the decision of the Executive Secretary, and concludes that the Respondent has not sufficiently dispelled the inference of prejudicial behaviour against the Applicant.

IX. Taking into account the foregoing considerations, the Tribunal decides that the Applicant shall receive, in addition to the compensation of six months net base salary recommended by the JAB and agreed to by the Respondent, a further six months net base salary at the rate in effect on the date of his separation from the service.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of six months of his net base salary at the rate in effect on the date of his separation from the service.

XI. The Tribunal also expresses the wish that the Respondent should find further employment for the Applicant on the staff of the United Nations or an Agency thereof, appropriate to his qualifications and experience.

XII. All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Presiding

Arnold KEAN
Member

Hubert THIERRY
Member

New York, 19 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary